IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.424 of 2003

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SHEELABEN M. PATEL - Appellant(s)
Versus
I.T. OFFICER - Opponent(s)

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Appearance :
MR JP SHAH with MR MANISH J SHAH for Appellant(s): 1
MR BB NAIK for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 22/11/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Heard Mr.J.P.Shah, learned advocate for the appellant, and Mr.B.B.Naik, learned Standing Counsel for the respondent.

2. ADMIT.

3. The following substantial question of law arises for determination:

> "Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in law in restoring the matter back to the file of the Assessing Officer to determine whether the sum of Rs.4,00,000/- which was received in cash by the assessee was or was not in consideration of surrender of tenancy rights ?"

4. The Assessment Year is 1990-91 and the relevant accounting period is Financial Year ended on 31st March, 1990. In the assessment order, framed under Section 143(3) read with Section 147 of the Income-tax Act, 1961 (the Act), the Assessing Officer has recorded as under:-

> "The assessee was carrying his business in the shop situated near Dhiraj Sons, Athwalines, Surat. This shop was owned by Shri Navinbhai Ratilal Modi and others

which was taken on monthly rent of Rs.80/- by the assessee. During this year under consideration, the assessee relinquished his tenancy right in respect of this shop and received an amount of Rs.5,00,101/- (Rs.1,00,101 by cheque and Rs.4,00,000/- in cash) in the month of January'90 from the owners of the shop. The receipt of an amount of Rs.5,00,101/- for relinquishment of his tenancy right in respect of shop at Athwalines was admitted by the assessee before the ADI, Surat during the course of giving his statement on oath u/s 131 of the Act on 28.10.91. The assessee also admitted before the ADI that out of Rs.500,101 an amount of Rs.400,000/- was received by him as ON MONEY for relinquishment of tenancy right for which he had also admitted a disclosure of income of Rs.400,000/- for the year under assessment as ON MONEY and undisclosed income. It may be pointed out that the amount of Rs.400,000/- has not been accounted for in the books of accounts.

However, in the course of proceedings u/s 148 of the Act, the assessee retracted from his statement given on oath by him before the ADI u/s 131 of the Act and had taken a stand that the amount received towards

> relinquishment of tenancy right is not taxable under the head capital gain relying upon the decision in the case of B.C.Srinivas Shetty, 128 ITR 294 and in view of the decision of various high courts. ......
>
> Apart from above, in fact the receipt of an amount of Rs.500,101/- as relinquishment of tenancy right is characterised as 'INCOME' in its general connotation ..... “

5. The Assessing Officer, accordingly, brought the sum of Rs.5,00,101/- to tax as income of casual and non-recurring nature in view of provisions of Section 10(3) read with Section 28(iv) of the Act.

6. The assessee carried the matter in appeal before the CIT (Appeals). Vide order dated 10th January, 1995, the CIT (Appeals) bifurcated the total amount of Rs.5,00,101/- into two parts : the first one being an amount of Rs.1,00,101/- being receipt by cheque, and the second one being Rs.4,00,000/- being receipt in cash. For the reasons stated in his order he came to the

conclusion that the sum of Rs.1,00,101/- which was received by cheque was not liable to tax as it was compensation received by a tenant for relinquishment of tenancy rights, and the same had wrongly been brought to tax under Section 10(3) read with Section 28(iv) of the Act.

7. Regarding the balance amount of Rs.4,00,000/-, it was recorded by the CIT (Appeals) that the onus lies on the assessee to prove that the receipt of Rs.4,00,000/- was on account of compensation in lieu of relinquishment of tenancy rights. That the assessee had not been able to disclose the source of the said sum of money and, therefore, the amount was taxable under the head “Income from Other Sources”.

8. Being aggrieved by the treatment given to the receipt in question by the CIT (Appeals), the assessee carried the matter in Second Appeal before the Tribunal. The Tribunal, after recording the facts and the submissions made, disposed of the appeal by making following observations:

> “..... The CIT(A) has not appreciated the explanation given at the time of examination under Section 131 wherein it was clearly admitted that the assessee had received unaccounted cash of Rs.4 lakh in addition to the cheque payment of Rs.1,00,101/- for relinquishment of the said shop. There is nothing on record to suggest that Rs.4 lakhs is not for relinquishment of tenancy right in addition to Rs.1,00,101/-. The fact that Rs.4 lakh is a part of Rs.5,00,101/- received at the time of surrendering, could be ascertained by the opportunity of cross-examination of the payee/shop owner. So in the facts and circumstances of the case, we restore the matter to the AO to decide the same after providing opportunity of hearing to legal heirs of assessee. This ground is allowed for statistical purposes accordingly.”

9. As can be seen from the aforesaid observations or findings, howsoever one may describe them, the Tribunal has contradicted itself in two sentences which follow one after another. If the earlier portion wherein it is observed that there was nothing on record to suggest that Rs.4,00,000/-

is not for relinquishment of tenancy rights in addition to Rs.1,00,101/- is correct, there was no occasion for the Tribunal to go on and observe in the second sentence that the said fact viz. Rs.4,00,000/- being part of Rs.5,00,101/- received at the time of surrender of tenancy could be ascertained by opportunity of cross-examination of the shop owner could not be correct. Similarly, the sentence which precedes, wherein the Tribunal has categorically recorded that the Commissioner (Appeals) had not appreciated the explanation given at the time of statement made under Section 131 of the Act wherein the assessee had clearly admitted receiving unaccounted cash of Rs.4,00,000/- in addition to the cheque payment of Rs.1,00,101/- for relinquishment of the said shop, could not have been recorded if the Tribunal was of the view that it was necessary to ascertain whether the said amount of Rs.4,00,000/- had been received at the time of surrender of tenancy rights.

10. The Tribunal has also failed to appreciate the true impart of the findings recorded by the Assessing Officer. There was no dispute, as can be seen from the extracted portion hereinbefore, as to source of receipt of Rs.4,00,000/- before the Assessing Officer. The Assessing Officer had treated the entire sum as taxable under Section 10(3) read with Section 28(iv) of the Act. The applicability of the said provisions had categorically been ruled out by the Commissioner (Appeals) and the only issue before the Tribunal was in relation to taxability of the amount of Rs.4,00,000/- as income from other sources as held by the CIT (Appeals), or non-taxability of the said sum as being compensation for relinquishment of tenancy rights. In the circumstances, the Tribunal ought to have recorded the correct findings of fact, and in the event it was inclined to restore the matter back to the file of the Assessing Officer, it ought not to have recorded any contradictory findings.

11. In these circumstances, the question is answered in the negative. The Tribunal was not justified in restoring the matter back to the Assessing Officer. The appeal is, accordingly, restored to the file of the Tribunal so as to decide the same afresh after giving reasonable opportunity of hearing to both the sides. Needless to state that in the view that the Court has taken, any observations made on merits of the matter are merely prima facie expression of opinion and the entire issue is at large before the Tribunal.

12. The appeal stands disposed of accordingly. There shall be no order as to costs.

[D.A. MEHTA, J]

[H.N. DEVANI, J]

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Bhavesh*